

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
TracFone Wireless, Inc. Emergency Petition for)	WC Docket No. 11-42
Declaratory Ruling)	
)	

**REPLY COMMENTS OF THE TELECOMMUNICATIONS ASSOCIATION
OF THE SOUTHEAST**

Mark D. Wilkerson
Wilkerson & Bryan, P.C.
405 South Hull Street
Montgomery, AL 36104
Phone: 334.265.1500
Facsimile: 334.265.0319
mark@wilkersonbryan.com

Dana H. Billingsley
Wilkerson & Bryan, P.C.
405 South Hull Street
Montgomery, AL 36104
Phone: 334.265.1500
Facsimile: 334.265.0319
dana@wilkersonbryan.com

Counsel for the Telecommunications Association of the Southeast

December 23, 2014

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization:)	WC Docket No. 11-42
)	
TracFone Wireless, Inc. Petition for)	
Declaratory Ruling)	
)	

**REPLY COMMENTS OF THE TELECOMMUNICATIONS ASSOCIATION
OF THE SOUTHEAST**

The Telecommunications Association of the Southeast (“TASE”)¹ submits these Reply Comments in response to TracFone Wireless Inc.’s (“TracFone’s”) Petition² seeking to preempt those provisions of Alabama law imposing 911 fees on Lifeline subscribers who receive so-called “no-charge” wireless Lifeline service.

¹ TASE was formerly known as the Alabama Mississippi Telephone Association. Its members serving Alabama include: Ardmore Telephone Company, Inc.; Blountsville Telephone LLC; Brindle Mountain Telephone LLC; Butler Telephone, Inc. (a subsidiary of TDS Telecom); Castleberry Telephone Company, Inc.; CenturyTel of Alabama, LLC; GTC, Inc.; Farmers Telecommunications Cooperative, Inc.; Gulf Telephone Company, LLC; Hayneville Telephone Company, Inc.; Hopper Telecommunications LLC; Knology Total Communications, Inc.; Knology of the Valley, Inc.; Millry Telephone Company, Inc.; Mon-Cre Telephone Cooperative, Inc.; Moundville Telephone Company, Inc.; National Telephone Company of Alabama, Inc.; New Hope Telephone Cooperative, Inc.; Oakman Telephone Co., Inc. (a subsidiary of TDS Telecom); Otelco Telephone, LLC; Peoples Telephone Company, Inc. (a subsidiary of TDS Telecom); Pine Belt Telephone Company, Inc.; Ragland Telephone Company, Inc.; Roanoke Telephone Company, Inc.; Union Springs Telephone Company, Inc.; Valley Telephone Co., LLC; and Windstream Alabama, LLC.

² *TracFone Emergency Petition for Declaratory Ruling*, WC Docket No. 11-42 (filed Oct. 23, 2014) (“TracFone’s Petition”).

TASE's membership includes thirty-six local exchange carriers providing service to portions of Alabama, Mississippi and Florida, including twenty-seven member companies that provide local exchange service in Alabama. All of TASE's Alabama members are eligible telecommunications carriers ("ETCs") participating in the federal Lifeline program, and all collect and remit Alabama's \$1.75 911 fee. TASE has long been an advocate for fairness and non-discrimination in the funding of 911 service and supported the passage of ALA. ACT 2012-293, which resulted in the creation of a statewide 911 Board and the implementation of a uniform, statewide 911 fee in 2013.

Several TASE members participated in the original comment round as the "Alabama ILECs".³ As discussed below, TASE joins the Alabama ILECs, the State of Alabama⁴ and others in urging the Commission to deny TracFone's Petition on the grounds that it conflicts with established law and would do harm to the objectives of the universal service program, as articulated by this Commission.

Alabama's 911 Fee Is Expressly Permitted Under 47 U.S.C. § 615a-1

TASE agrees with the Alabama and Indiana commenters that application of the 911 charge to users of TracFone's service offering is a protected exercise of the state's police power to fund an enhanced 911 system and ensure its availability to all voice telecommunications

³ TASE members previously filing comments include Farmers Telecommunications Cooperative, Inc., Millry Telephone Company, Inc., Mon-Cre Telephone Cooperative, Inc., Moundville Telephone Company, Inc., National Telephone Company of Alabama, Inc., New Hope Telephone Cooperative, Inc., Pine Belt Telephone Company, Inc., Roanoke Telephone Company, Inc., and Union Springs Telephone Company, Inc.

⁴ Comments of the State of Alabama and Its Statewide 9-1-1 Board Opposing TracFone Wireless's Petition for Declaratory Ruling (the "State of Alabama").

services. (*See* 47 U.S.C. § 615a-1, which provides that “[n]othing in . . . the Communications Act of 1934 (47 U.S.C. 151 et seq.) . . . or any Commission regulation or order” can preempt states from collecting a fee or charge “applicable to commercial mobile services” that is “specifically designated . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services.”)⁵

Alabama’s 911 fee falls squarely within the saving clause established by 47 U.S.C. § 615a-1, a provision largely ignored in TracFone’s Petition and Sprint’s supporting comments. Alabama’s “monthly statewide 911 charge” is indisputably “applicable to commercial mobile services” and is “specifically designated” for the “support or implementation of 9-1-1 or enhanced 9-1-1 services.” Alabama law requires the fee to be “uniformly applied and . . . imposed throughout the state, and [to] replace all other 911 fees or 911 taxes,” and specifies that “all revenues derived from the service charge levied on voice communications service providers under this chapter and all prepaid wireless 911 charges received” shall be used for support and implementation of 911 services. ALA. CODE §§ 11-98-5(a) and -5.2(a) (1975 as amended). The Alabama Supreme Court has affirmed that “the money from the service charge is used to fund the emergency 911 service provided via that connection” and “does not provide general revenue that can be used for any purpose.” *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 984 (Ala. 2011). TracFone’s Petition is thus due to be denied solely on the basis of the saving clause in Section 615a-1(f)(1), regardless of the merits of its remaining arguments.

⁵ 47 U.S.C. § 615a-1(f)(1).

**Alabama's 911 Statute Does Not Prevent TracFone from Passing Through
the Full Benefit of the Federal Lifeline Benefit**

TracFone's Petition is due to be denied on other grounds, as well. TracFone contends that the application of Alabama's 911 law to its service should be preempted because it "conflict[s] with a Lifeline consumer's legal entitlement to receive the full amount of the federal Lifeline benefit and with an ETC's obligation to pass through the full amount of the USF Lifeline Support" and is otherwise "an obstacle to the accomplishment of the purposes and objectives expressed by the Congress..." TracFone's Petition at 16. As TracFone acknowledges, however, numerous other carriers, including TASE members, use the Lifeline subsidy to give their customers a required "discount below the standard charges." TracFone's Petition at 17. Nevertheless, these carriers collect the \$1.75 fee from their Lifeline customers and remit the same to the state. The exceptions are TracFone and (apparently) Sprint, through its Assurance Wireless affiliate.⁶

TracFone's argument fails for several reasons. Obviously, nothing prevents TracFone, Sprint, or any other carrier from passing on the full benefit of the Lifeline subsidy and to collect the statewide 911 fee from their customers. TracFone's practice of not billing its customers is nothing more than a business model and marketing strategy. Should TracFone seek to retain its "no-bill" strategy, it could do so by allowing its customers to allocate part of the \$9.25 subsidy to the 911 fee. Contrary to Sprint's comments on page 3, this would be consistent with federal law because, among other reasons, "access to . . . 911 and enhanced 911" services has long been a functionality of supported "voice telephony services" under 47 C.F.R. § 54.101 and a

⁶ TASE is unaware of Sprint's current status in Alabama.

requirement specifically placed on TracFone (“Moreover, TracFone must continue to provide access to ‘basic *and* enhanced 911 service’ as described in section 20.18(m) of [the Commission’s] rules.” 23 FCC Rcd. 6206, 6215 (2008)).⁷ The customer would thus receive the full benefit of the subsidy, regardless of whether TracFone collects a check for the \$1.75 911 fee or applies a portion of the Lifeline subsidy to avoid a money exchange. As several commenters have pointed out, the amount of “free” minutes provided by TracFone is not subject to an FCC minimum threshold, but has varied over time and can be further adjusted, should TracFone elect to allow its customers to pay the 911 fee in that fashion. This is just one of several steps that TracFone could take to comply with state law. *See* State of Indiana’s Comments in Opposition to TracFone Wireless, Inc.’s Emergency Petition for Declaratory Ruling at 12-13.

**Alabama’s 911 Statute Does Not Prohibit TracFone from
Providing Telecommunications Service**

For the same reasons, TracFone has not met its burden of justifying preemption under 47 U.S.C. § 253(a), which applies only to state laws that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” In its Petition, TracFone merely alleges that the collection of Alabama’s 911 fee would negatively impact its current “no-charge” pricing model, not its ability to provide mobile service in general. If the Petition is denied, TracFone would merely be required to operate under the same rules applicable to other providers of Lifeline services in Alabama, and its customers would be required to support the 911 network from which they benefit. As one commentator has pointed

⁷ 47 C.F.R. § 54.101

out, “A 9-1-1 fee that merely prevents a Lifeline provider from earning its desired profit margin does not prohibit the provision of service.” Opposition of the Boulder Regional Emergency Telephone Service Authority at 6.

Preemption Would Frustrate a Key Objective of the Universal Service Program: the Availability of 911 and Enhanced 911 Service

This Commission has long required carriers to provide access to 911 and enhanced 911 service as a condition of ETC certification. *See* 47 C.F.R. § 54.101. Indeed, TracFone’s eligibility for Lifeline support was premised upon its certification that it is in “compliance with any applicable 911/E911 obligations, including obligations relating to the provision and support of 911 and E911 service.” *In the Matter of Fed.-State Joint Bd. on Universal Serv. TracFone Wireless, Inc.*, 24 FCC Rcd. 3375, 3379 (2009).⁸

The history of Alabama’s 911 funding demonstrates the deleterious impact of favoring one technology or business model over those of other providers. Prior to 2012, Alabama law established a fixed, statewide 911 charge on wireless service (including prepaid), while allowing each of Alabama’s eighty-eight 911 Districts to set varying fees on landline service. As the number of landline customers declined, 911 Districts in Alabama raised landline 911 fees to well over \$5.00 per month to compensate for lost fee revenue, resulting in the highest wireline 911 fees in the nation. There was a recognized need for a single, statewide fee that applied to all

⁸ Later, TracFone asked this Commission to rescind its requirement to certify compliance with the 911/E911 obligations in each state. In denying the request, the Commission reiterated that “Lifeline funds should not be disbursed to any carrier that is not . . . complying with state-level obligations regarding 911 funding,” particularly since “extending emergency services to the most needy was a motivating factor in the Commission’s initial grant of forbearance to TracFone.” *In the Matter of Fed.-State Joint Bd. on Universal Serv. TracFone Wireless, Inc.*, 25 FCC Rcd. 4661, 4664 (2010). *See* Comments of State of Alabama at 7-8.

users of the 911 network, regardless of technology, which occurred with passage of ALA. ACT 2012-293 (as codified at ALA. CODE § 11-98-1, *et seq.* (1975 as amended)). TracFone's Petition seeks to turn back the clock.

While TASE shares the desire to reduce Alabama's \$1.75 911 fee, the imposition of the current non-discriminatory statewide fee is a vast improvement over the state's pre-2012 911 funding structure, a fact lost on some consumer advocacy groups filing comments, such as the National Taxpayers Union, Americans for Tax Reform and the National Consumers League.⁹ TracFone's complaint about the level of Alabama's 911 charge is ironic, since its refusal to collect and remit the same 911 fee has been a contributing factor. If granted, TracFone's Petition would result in further increases in the statewide 911 fee required to be collected and paid by other carriers, while providing TracFone an unjustified advantage over other providers of Lifeline

⁹ For example, the National Taxpayers Union states that "In 2013, the Board more than doubled the 911 fee [for prepaid wireless] from 70 cents to \$1.60 per month. Shortly after, it voted for an additional \$10 million increase that would raise the monthly rate to \$1.80. Meanwhile, legislation has circulated through the State Senate that could push this monthly 'fee' past \$2.00 or more per month. ... [I]t appears that there has been little oversight and accountability of these funds..." Comments at 3. The National Consumers League states that "the state of Alabama currently collects one of the highest E-911 fees in the country at \$1.75 per line, per month." Comments at 1. While noting Alabama's previous statutory fee schedule, the Americans for Tax Reform states, in error and without authority, that the latest fee adjustment was not only a tax hike, but an extension of the fee for the first time to no-charge Lifeline subscribers. These comments reflect a lack of understanding of the history and calculation of Alabama's 911 charge and the 911 fee hike that would be imposed on other consumers if TracFone's Petition is granted.

service.¹⁰ If all Lifeline service is deemed exempt from the imposition of 911 fees, the fee burden imposed on the remaining voice users will go up even further.

TracFone benefits greatly from the ability to offer access to the 911 network. Its ability to provide 911 access allowed it to receive \$1,054,112.00 per month in federal Lifeline subsidies in Alabama in 2014 alone.¹¹ Comments of State of Alabama at Appendix A. Access to emergency services also figures prominently in TracFone's marketing of "no-charge" Lifeline service. *See* State of Indiana's Comments in Opposition to TracFone Wireless, Inc.'s Emergency Petition for Declaratory Ruling at 9, citing to *Plan Features*, SafeLink Wireless, https://www.safelinkwireless.com/Enrollment/Safelink/en/NewPublic/plan_features.html. *See also* Kentucky Office of the 911 Coordinator's Amended Comments to TracFone Wireless, Inc.'s Emergency Petition for Declaratory Ruling at 8.¹² Its customers should not be exempted from the obligation to share in the cost of 911 network.

¹⁰ Alabama law requires the 911 fee to be periodically adjusted to ensure a funding threshold is met, with the funding requirement divided by the number of voice communication service connections deemed subject to the fee. The removal of "no-charge" Lifeline customers from the funding base thus has a direct impact on the 911 fee calculation. ALA. CODE §§ 11-98-5(a), (c) (1975 as amended).

¹¹ As Alabama, Indiana and Kentucky point out, TracFone's compliance with 911/E911 requirements also bore on the question of whether its designation as an ETC was in the public interest. *In the Matter of Fed.-State Joint Bd. on Universal Serv. TracFone Wireless, Inc.*, 24 FCC Rcd. 3375, 3379 (2009); 25 FCC Rcd. 4661, 4663 (2010).

¹² TracFone's Petition further states that it is a provider of "no charge, non-billed Lifeline service" and that "Lifeline customers receive free monthly service, free airtime each month, and a free handset," among other features also provided at no monthly charge. TracFone's Petition at 4, 13, 20.

Conclusion

TracFone has failed to meet the requirements for federal preemption of Alabama's 911 laws and regulations as they apply to its "no-charge" 911 service, and its Petition should thus be denied.

Respectfully submitted,

By: 

Mark D. Wilkerson
Dana H. Billingsley
Wilkerson & Bryan, P.C.
405 South Hull Street
Montgomery, AL 36104
334.265.1500
mark@wilkersonbryan.com
dana@wilkersonbryan.com

*Counsel for the Telecommunications Association of
the Southeast*

December 23, 2014